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No. 01-370

In The

Supreme Court of the United States

JASON RICHARDS, ET AL.,

Petitioners,

v.

JEFFERSON COUNTY, ALABAMA, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The Alabama Supreme Court

JEFFERSON COUNTY'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Whether as the result of murky understanding or sensationalist exaggeration, the questions presented for review in the Petition (at pp. i-ii) are prolix and confusing. The respondent Jefferson County considers the following to be a fair and comprehensive statement of the questions presented for review:

I.

Do the exemptions from Jefferson County's Occupational Tax mandated by Section 4 of Act No. 406 enacted at the 1967 Regular Session of the Legislature of Alabama ("Act No. 67-406") or allowed by Section 1(B) of the County's Ordinance No. 1120 (1987) ("Ordinance No. 1120") deprive petitioners of equal protection, in violation of the Fourteenth Amendment to the United States Constitution?

II.

In reviewing the trial court's ruling on whether the exemptions from the County's occupational tax deny equal protection to petitioners (plaintiffs below), was the Alabama Supreme Court limited to the record at trial, bound by a county commissioner's "uncontradicted testimony," or bound by the trial court's findings of fact and conclusions of law?

QUESTIONS PRESENTED FOR REVIEW – Continued

III.

In reviewing the trial court's ruling on whether the exemptions from the County's occupational tax deny equal protection to petitioners (plaintiffs below), was the Alabama Supreme Court entitled to conduct an independent, *de novo* review of the "facts" and, consistent with the separation of powers between the judicial and legislative branches, recognize that the Alabama Legislature had no obligation to articulate its purpose or rationale for the exemptions and, further, recognize that, in enacting tax legislation, particularly with respect to occupational taxes, the Legislature has broad discretion to classify businesses, trades and professions and tax them at different rates or to exempt them altogether from taxation?

IV.

Does Jefferson County's enforcement of Ordinance No. 1120 deny equal protection to petitioners (plaintiffs below) in violation of the Fourteenth Amendment?

V.

Does Jefferson County's failure to date to sue a few ordained ministers who refuse to pay the occupational tax constitute a violation of the equal protection rights of "Muslim clerics" or "tent evangelists" that can be asserted in this case by petitioners (plaintiffs below) who are not "Muslim clerics" or "tent evangelists"?

QUESTIONS PRESENTED FOR REVIEW – Continued

VI.

Does the Alabama Supreme Court's decision below "overrule" or conflict with this Court's decision in *Jefferson County v. Acker*, 527 U.S. 423 (1999)?

VII.

Does the Alabama Supreme Court's decision below conflict with this Court's decisions in *F.S. Guano Co. v. Virginia*, 253 U.S. 412 (1920); *Plyler v. Doe*, 457 U.S. 202 (1982); *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000); *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985); *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1984); *WHYY, Inc. v. Borough of Glassboro*, 393 U.S. 117 (1968); *Sioux City Bridge Co. v. Dakota County, Nebraska*, 260 U.S. 441 (1923); *Mayflower Farms, Inc. v. Ten Eyck*, 297 U.S. 266 (1936); *Zobel v. Williams*, 457 U.S. 62 (1982); *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985); or *Sunday Lake Iron Co. v. Wakefield Township*, 247 U.S. 350 (1918)?

THE COUNTY'S CORRECTION OF PETITIONERS' CERTIFICATE OF INTERESTED PERSONS

The County's counsel listed in the Petition should include the following:

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JEFFERSON COUNTY'S CORRECTIONS TO PETITIONERS' STATEMENT OF THE CASE

I. The County's corrections to petitioners' statement of prior proceedings

A. This Court did not articulate the basis for its 1996 order limiting oral argument

In an effort to persuade this Court that Jefferson County's occupational tax raises novel and important questions which should be, but have not been, settled by this Court, the Petition argues (at p. 2):

> This Court granted certiorari on the *res judicata* issue and also on the exact equal protection issue which is now embraced by this petition. *Richards*, 516 U.S. 983 (1995). But before oral argument, this Court determined that neither the trial court nor the Alabama Supreme Court had opportunities to address the merits of petitioners' equal protection claims, and on that basis dismissed the writ as improvidently granted. *Richards*, 516 U.S. 1167 (1996). . . .

It is far from clear that the Petition correctly states the "basis" for this Court's 1996 Order directing the parties to limit oral argument to the *res judicata* issue. The 1996 Order may well have been prompted by the County's having demonstrated that petitioners Richards et al. had erroneously represented to this Court (at p. 8 of petitioners' Brief on the Merits submitted to this Court in 1996 in connection with *Richards v. Jefferson County*, 517 U.S. 793 (1996)) that Section 1(B) of Ordinance No. 1120 not only exempted "insurance companies, express companies, railroads, banks and pubic utilities" but also "completely exempts, without explanation, all employees

of these powerful business interests. . . . " The employees are not now exempt and never have been exempt.

B. The decision below does not overrule or conflict with this Court's *Acker* decision

The Petition (at p. 3) erroneously states that the Alabama Supreme Court's June 22, 2001, Opinion below:

> rejected this Court's factual interpretation of the same tax and exemption scheme set forth in *Jefferson County v. Acker*. . . .

The opinion below for the Alabama Supreme Court does not cite or discuss this Court's opinion in the *Acker* case. In *Parker v. Jefferson County*, ___ So. 2d ___ (Ala. Nov. 7, 2000) [Resp. App. 1-6.], *rehearing denied*, ___ So. 2d ___ (Ala. April 20, 2001) [Resp. App. 7 ff.][1] – an independent case generated by an opportunistic response to this Court's *Acker* opinion – the Court had earlier concluded that the *Acker* opinion dealt solely with a question of federal law in holding that the County's occupational tax constituted a non-discriminatory, revenue-raising tax to which Congress had consented in the Public Salary Tax Act, 4 U.S.C. § 111. This Court noted in *Acker* that the Public Salary Tax Act "does not require the local tax be a typical 'income tax'." 527 U.S. at 442.

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[1] References to the Appendix to the Petition, which is bound with the Petition, are indicated by Pet. App., followed by the relevant page numbers in the Appendix (e.g., Pet. App. 2-36). References to the Appendix to Jefferson County's Brief in Opposition, which is separately bound with an orange cover, are indicated by Resp. App., followed by the relevant page numbers in the Appendix (e.g., Resp. App. 1-6).

Applying Alabama law, the Alabama Supreme Court held, in *Parker*, that Jefferson County's Ordinance No. 1120 serves a revenue raising function, but is valid under Alabama law because it imposes permissible "occupational" or "privilege" taxes or "licensing fees" rather than impermissible "income taxes." Chief Justice Moore dissented from the opinion below in this case and also dissented from the Alabama Supreme Court's opinion denying rehearing in *Parker*.

II. The County's corrections to petitioners' statement of facts

Petitioners' Statement of Facts (at pp. 3-8 of the Petition) is misleading when it argues (at p. 5) that:

> At trial, it was established, without contradiction, that when Jefferson County enacted its occupational tax, it did so with the inclusion of "loopholes" for a "sizable number of professions, with no apparent rationale."

A former county commissioner merely testified at trial he did not understand the rationale for exempting "lawyers, sleight-of-hand artists, psychic healers and playing card salesmen." The former commissioner's testimony is irrelevant, because the Legislature, not the County Commission, had mandated in Act No. 406 (Ala. Acts 1967) that lawyers, doctors, and other professionals already being taxed by the State, as well as other specified businesses and occupations that had been subject to state and county business license taxes since 1935 (Ala. Code 1975, Tit. 40, Chap. 12, Art. 2), should be exempted from the new license taxes that the Legislature by Act No. 406 was then

authorizing the County to levy on previously exempt businesses.

The Petition (at p. 7) misstates the record in purporting to summarize the testimony of the "county's chief financial officer." In fact, the cited testimony was given by Wayne Averitt,[2] the Chief Financial Officer of the Birmingham-Jefferson Civic Center Authority. [Resp. App. 13-26.] Moreover, the hotel referred to in the Petition (at p. 7) was purchased by the Civic Center Authority out of its bond proceeds, and not by the County out of tax revenues, as misrepresented by the Petition. [Resp. App. 22.]

The Petition (at p. 8) misstates the testimony of Edwin A. Strickland, the County Attorney. In his testimony, Mr. Strickland did *not*, as the Petition (at p. 8) claims, express the "opinion that the purpose of the tax is to raise revenue and exercise police power." Instead, Mr. Strickland testified as follows (at pp. 555-556) of the trial transcript [Resp. App. 61-62.]:

> Q. Based on your reading of Act 406, what is its purpose? Does it have the purpose of raising revenue, the purpose of regulating occupations in Jefferson County, or some combination of both?
>
> A. I think its purpose is to raise revenues.
>
> Q. That's purely its function in your evaluation?
>
> A. It is.

---

[2] The trial transcript contains a number of misspellings, including the name of Mr. Averitt.

* * *

Q. And did the County Commission in 1987 adopt Ordinance 1120 for the sole purpose of raising revenues?

A. That's correct.

ARGUMENT

I. This case does not merit review by certiorari because the decision below does not conflict with prior decisions of this Court or raise a novel question which has not been, but should be, settled by this Court.

Rule 10 of this Court's Rules, read in conjunction with 28 U.S.C. § 1257, makes it clear that

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons.

Rule 10 goes on to provide that this Court may, in the exercise of its discretion, grant certiorari when a state court of last record has decided an important federal question "in a way that conflicts with relevant decisions of this Court" or has decided an important question of federal law "that has not been, but should be, settled by this Court."

The Alabama Supreme Court's opinion below does not involve a new and novel question that has not been, but should be, settled by this Court. Instead, the opinion below follows, and properly applies, long-established and well-

settled rules of law established by this Court's prior decisions in holding that the exemptions mandated by Section 4 of Act No. 406 enacted at the Regular Session of the Legislature of Alabama (hereinafter "Act No. 67-406") and the exemptions allowed by Section 1(B) of Ordinance No. 1120 enacted by the Jefferson County Commission on November 6, 1987 (hereinafter "Ordinance No. 1120") do not violate the Equal Protection Clause of the Fourteenth Amendment.

The Alabama Supreme Court's decision below does not "overrule" or in any other way conflict with this Court's prior decision in *Jefferson County v. Acker*, 527 U.S. 423 (1999), as argued by petitioners (at pp. i, ii, 3, and 14-16 of their Petition). Because the Petition places such great emphasis on the supposed conflict between the decision below and this Court's decision in *Acker*, we will demonstrate below (in Part III of the Argument) that there is no conflict.

Petitioners cite a number of other decisions of this Court which petitioners argue are in conflict with the Alabama Supreme Court's decision below. None of these decisions exhibit the claimed conflict. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), involved an equal protection challenge to a zoning ordinance; *Mayflower Farms, Inc. v. Ten Eyck*, 297 U.S. 266 (1936), involved an equal protection challenge to state legislation regulating the price of milk; *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000), involved an equal protection challenge to a municipality's demand for an easement in order to obtain access to a municipal water system; and *Plyler v. Doe*, 457 U.S. 202 (1982), involved an equal protection challenge to legislation excluding the children of illegal aliens from obtaining access to the state's public schools.

None of the above cited cases involved the enactment of tax legislation, in which this Court has long recognized that state legislatures have broad discretion. The remainder of the equal protection decisions of this Court cited in the Petition as conflicting with the decision of the Alabama Supreme Court below do not involve occupational taxes, with respect to which this Court has repeatedly held that state and local governments have *particularly* broad discretion, and all of the decisions cited by petitioners are distinguishable. For example, *Zobel v. Williams*, 457 U.S. 62 (1982), involved heightened scrutiny because the state's legislation infringed upon the constitutional right of U.S. citizens to travel or settle in another state.

In addition, petitioners have not carried their burden of showing that Jefferson County's enforcement and collection efforts under Act No. 67-406 and Ordinance No. 1120 deprive petitioners of equal protection, or that the County's collection and enforcement efforts raise novel and important issues which have not been, but should be, settled by this Court.

Petitioners (who are neither "Muslim clerics" nor "tent evangelists") do not have legal standing to seek certiorari with respect to the question whether Muslim clerics and tent evangelists have been deprived of equal protection as a result of the county's enforcement and collection efforts under Act No. 67-406 and Ordinance No. 1120, in light of this Court's prior decisions in *Allen v. Wright*, 468 U.S. 737, 751 (1984); *Oliver Iron Mining Co. v. Lord*, 262 U.S. 172, 180 (1923); and *Hendrick v. Maryland*, 235 U.S. 610, 621 (1915), which impose a "general prohibition on a litigant's raising another person's legal rights" and which establish that "[o]nly those whose rights are

directly affected can properly question the constitutionality of a state statute and invoke [the United States Supreme Court's] jurisdiction in respect thereto".

II. The decision below (which upholds certain tax exemptions mandated by the Alabama Legislature's Act No. 67-406 and other exemptions allowed by the County's Ordinance No. 1120) is consistent with, and supported by, well-established rules of law enunciated in prior decisions of this Court.

Petitioners (plaintiffs below) concede in their Petition to this Court (at p. 8) that petitioners are *not* members of a suspect or quasi-suspect class. Petitioners also concede (at pp. 9-14) that they have the burden to establish that the exemptions of which petitioners complain are so irrational and wholly arbitrary that the exemptions violate the Equal Protection Clause.

In their Petition, the petitioners argue (at pp. ii, 5-8, and 12-15), as they did in the Alabama Supreme Court below, that any appellate court, in reviewing a trial court's determination that a statute or ordinance violates the Equal Protection Clause, is bound by the trial court's finding of fact and conclusions of law, and may not conduct an independent *de novo* review of the facts. The Alabama Supreme Court correctly rejected this argument [*See* Pet. App. 7-10.].

Petitioners argue (at p. 5 of the Petition):

> At trial, it was established, without contradiction, that when Jefferson County enacted its occupational tax, it did so with the inclusion of

> "loopholes" for a "sizable number of professions, with no apparent rationale." (Tr. 32) The only commissioner available at trial who was present when the tax was enacted testified: "I would have a hard time determining what sleight of hand artists, psychic healers, playing card salesmen and lawyers have in common. There is no rationale." (Tr. 39)

Also, at p. 7, the Petition argues that "[n]o expert witness testified that the County's exemption scheme was rational" and argues at p. 14 that it is "impossible" for the County to "articulate a rational basis for its exemption of the odd group it has chosen to evade taxation . . . ".

Nowhere does the Petition mention or discuss the fact that the Alabama Legislature (not the governing body of the County) *mandated* exemptions for persons already subject to the state license tax. Nowhere does the Petition mention or discuss the fact that the lawyers, doctors, and persons engaged in other specified professions whom the Legislature required to be exempted from the County's occupational tax are now being taxed (and since the 1930's have been taxed) by the state pursuant to the State License Code (Ala. Code 1975, Tit. 40, Chap. 12, Art. 2). Moreover, the Petition nowhere discusses prior decisions of this Court which have held that the legislature is vested with discretion in levying taxes, the strong presumption of validity which the judiciary must give to the validity of legislative enactments (*particularly* in the field of taxation), and the fact that the legislature need not articulate or state its rationale for a legislative classification.

As this Court held in its opinion in *FCC v. Beach Communications*, 508 U.S. 307 (1993):

> On rational-basis review, a classification in a statute such as the Cable Act comes to us bearing a strong presumption of validity, *see Lyng v. Automobile Workers*, 485 U.S. 360, 370, 108 S. Ct. 1184, 1192, 99 L. Ed. 2d 380 (1988), and those attacking the rationality of the legislative classification have the burden "to negative every conceivable basis which might support it," *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364, 93 S. Ct. 1001, 1006, 35 L. Ed. 2d 351 (1973) (internal quotation marks omitted). *See also Hodel v. Indiana*, 452 U.S. 314, 331-332, 101 S. Ct. 2376, 2387, 69 L. Ed. 2d 40 (1981). Moreover, because we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature. *United States Railroad Retirement Bd. v. Fritz*, *supra*, 449 U.S. at 179, 101 S. Ct. at 461. *See Flemming v. Nestor*, 363 U.S. 603, 612, 80 S. Ct. 1367, 1373, 4 L. Ed. 2d 1435 (1960). Thus, the absence of " 'legislative facts' " explaining the distinction "[o]n the record," 294 U.S. App. D.C. at 389, 959 F.2d at 987, has no significance in rational-basis analysis. *See Nordlinger v. Hahn*, 505 U.S. 1, 15, 112 S. Ct. 2326, 2334, 120 L. Ed. 2d 1 (1992) (equal protection "does not demand for purposes of rational-basis review that a legislature or governing decisionmaker actually articulate at any time the purpose or rationale supporting its classification"). In other words, a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical

> data. *See Vance v. Bradley, supra,* 440 U.S. at 111, 99 S. Ct. at 949. *See also Minnesota v. Clover Leaf Creamery Co.,* 449 U.S. 456, 464, 101 S. Ct. 715, 723, 66 L. Ed. 2d 659 (1981). " 'Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function.' " *Lehnhausen, supra,* 410 U.S. at 365, 93 S. Ct. at 1006 (quoting *Carmichael v. Southern Coal & Coke Co.,* 301 U.S. 495, 510, 57 S. Ct. 868, 872, 81 L. Ed. 1245 (1937)).

508 U.S. at 314-15.

Earlier, this Court held in *Bell's Gap R. Co. v. Pennsylvania,* 134 U.S. 232, 237 (1890):

> [The Equal Protection Clause] was not intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all. . . . *It may impose different specific taxes upon different trades and professions* and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature. . . . We think that we are safe in saying that the fourteenth amendment was not intended to compel the states to adopt an iron rule of equal taxation. If that were its proper construction, it would not only supersede all those constitutional provisions and laws of some of the states, whose object is to secure

> equality of taxation, and which are usually accompanied with qualifications deemed material, but it would render nugatory those discriminations which the best interests of society require; which are necessary for the encouragement of needed and useful industries, and the discouragement of intemperance and vice, and which every state, in one form or another, deems it expedient to adopt. [Emphasis added.]

See also Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 509 (1937):

> *It is inherent in the exercise of the power to tax that a state be free to select the subject of taxation and to grant exemptions. Neither due process nor equal protection imposes upon a state any rigid rule of equality of taxation.* [Citations omitted.] This Court has repeatedly held that *inequalities which result from a singling out of one particular class for taxation or exemption, infringe no constitutional limitation.* [Citations omitted.] [Emphasis added.]

It is well established that a state does not deny equal protection of the laws merely because the state (a) imposes a license tax on a class of persons engaged in one business but exempts others engaged in a similar business, or (b) discriminates in favor of one class and against another class of persons. *See, e.g., Quong Wing v. Kirkendall*, 223 U.S. 59, 62-64 (1912) (upholding a statute which levied a license tax on persons working in hand laundries, but which exempted those persons working in steam laundries); *Bradley v. City of Richmond*, 227 U.S. 477 (1913); *Southwestern Oil Co. v. Texas*, 217 U.S. 114 (1910); *Williams v. Fears*, 179 U.S. 270 (1900).

This venerable rule has been repeatedly reaffirmed by this Court:

> " 'The broad discretion as to classification possessed by a legislature in the field of taxation has long been recognized. . . . [T]he passage of time has only served to underscore the wisdom of that recognition of the large area of discretion which is needed by a legislature in formulating sound tax policies. Traditionally classification has been a device for fitting tax programs to local needs and usages in order to achieve an equitable distribution of the tax burden. It has, because of this, been pointed out that *in taxation, even more than in other fields, legislatures possess the greatest freedom in classification.*' " [Emphasis added.]

Leathers v. Medlock, 499 U.S. 439, 451 (1991) (quoting *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 547-48 (1983) (quoting *Madden v. Kentucky*, 309 U.S. 83, 87-88 (1940))).

Moreover, as this Court has frequently observed:

> A state may exercise a wide discretion in selecting the subjects of taxation . . . [Citations omitted.]*"particularly as respects occupation taxes"*. [Emphasis added.]

New York Transit Corp. v. City of New York, 303 U.S. 573, 578 (1938); *Oliver Iron Mining Co. v. Lord*, 262 U.S. 172, 179 (1923).

In *Brown-Forman Co. v. Kentucky*, 217 U.S. 563, 573 (1910), this Court reasoned:

> A very wide discretion must be conceded to the legislative power of the states in the classification of trades, callings, businesses, or occupations which may be subjected to special forms of regulation or taxation through an excise or license tax. If the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law.

Furthermore, as this Court observed in *Carmichael v. Southern Coal & Coke Co., supra* at 509:

> A *legislature is not bound to tax every member of a class or none. It may make distinctions of degree having a rational basis, and when subjected to judicial scrutiny they must be presumed to rest on that basis if there is any conceivable state of facts which would support it.* [Emphasis added.]

Likewise, in *New York Transit Corp. v. City of New York, supra* at 578, a tax classification subject to rational basis review must be held valid "if any state of facts reasonably can be conceived that would sustain it".

It is wholly irrelevant, therefore, that a former county commissioner testified below that he did not understand the rationale for the exemptions for lawyers, sleight-of-hand artists, etc. After all, those exemptions were *not* the result of an "exemption scheme" devised by the Jefferson County Commission, but instead were *mandated* by the Alabama Legislature. As part of the general revenue act of 1935, the Alabama Legislature enacted the State License Code (now codified as Ala. Code 1975, Tit. 40, Chap. 12, Art. 2) under which state-licensed professionals (such as attorneys, doctors, architects and accountants),

together with many ordinary businesses (such as abstract companies, building contractors, lumberyards, service stations, etc.), were (and are today) required to pay license taxes to the state for the purpose of raising revenue and not for the purpose of regulation. The State License Code also included a number of marginal and transient occupations and businesses – common in the 1930s but sounding quaintly anachronistic today – such as fortune tellers, itinerant peddlers, magic shows, transient moving picture shows, and vaudeville shows. Except for certain specified state-licensed professionals, the State License Code also levies on the state taxpayers a "piggy back" tax that is paid to the counties of the state.

Act No. 67-406 was enacted in 1967 to enable the County to levy business license taxes – including occupational taxes on those natural persons who work in an employer-employee relationship – on all persons who were not covered by the State License Code and who had therefore escaped paying any license taxes to the County since the Code's 1935 inception. Act No. 67-406 specifically authorized the County to "levy a license or privilege tax upon any person for engaging in any business for which he is not required by law to pay any license or privilege tax to either the State of Alabama or the county by any of the following: Article 1, Chapter 20, Title 51; Sections 176, 177, 178, 180, 182, 183, 184, 186, 429, and 826 in Title 51 of the Code of Alabama of 1940 as amended". Thus, all the businesses that were then, and continue now to be, taxed under the State License Code were specifically exempted from the County's taxing authority conferred by Act No. 67-406.

The marginal or transient businesses put into the State License Code in 1935 have not been since removed by the Legislature, and their continued inclusion in the State License Code meant that they could not be separately or additionally taxed by the County pursuant to its new (in 1967) authority under Act No. 67-406. The historical inclusion of these marginal businesses in the State License Code gives the plaintiffs the opportunity to assemble colorful lists of businesses exempt from Act No. 67-406 and falsely claim that the occupational tax – since it must exempt natural persons who pursue those businesses as sole proprietors – is levied on an irrational collection of taxpayers. In fact, and as fully demonstrated by the record in this case, the occupational tax (with the exception of certain state-licensed professionals) is levied on the compensation of every natural person who works in Jefferson County as an employee of any business entity that is legally distinct from its employees. People who conduct their business as sole proprietors do not pay the occupational tax because, by the terms of Ordinance No. 1120, they are not employees and because, as sole proprietors, they pay business license taxes under either the State License Code or the County's business license code implemented in 1968 pursuant to Act. No. 67-406.

Even though business license taxes and the County's occupational tax are merely subcategories of the general category of privilege, excise and license taxes, several practical distinctions between these two categories are relevant to understanding this case. Unlike business license taxes which are levied on the legal entities (e.g., corporation, partnership or sole proprietor) that conduct particular businesses, the occupational tax is levied only

on natural persons who work as employees. Further, while business license taxes are levied at different rates using various indices reflecting the scale and nature of the businesses, the occupational tax is uniformly levied on all employees at the same rate (1/2 of 1% of compensation earned within the County) without distinction as to the kind of work they perform. Jefferson County, with only the limited exceptions explained below, has levied and collected, and continues to levy and collect, the occupational tax from every person who works as an employee in the County – more than 400,000 persons in 1997 as shown by the evidence presented at trial. Godeke Testimony [Resp. App. 26-39.]; Defendant's Exhibit 9 [Resp. App. 101-108.]; Defendant's Exhibit 12 [Resp. App. 109-110.].

As recognized by the Alabama Supreme Court in its opinion below [Pet. App. 15.], the occupational tax is levied and collected with only the following exceptions: (i) individuals who do business as sole proprietorships and pay taxes to the County under its general business license code authorized by Act. No. 67-406; (ii) individuals who do business as sole proprietorships and pay taxes under the State License Code, which in most instances include "piggyback" taxes to the County; (iii) individuals engaged in certain learned professions (e.g., lawyers, doctors, accountants, architects, etc.) who are required to pay state license taxes and are expressly protected by state law from taxation by the County; and (iv) persons who are employed as domestic workers in

private homes and are expressly exempted from the occupational tax by Ordinance No. 1120.[3] The trial record shows that, at the time of the trial in 1997, the working population of the County – more than 400,000 people – contained 9,004 sole proprietors who did not pay the occupational tax because they paid a County business license tax instead, 11,556 sole proprietors subject to state and "piggyback" county license taxes who did not pay the occupational tax, and 7,835 state-licensed professionals who paid state license taxes and were exempted by state law from county taxation.

As recognized in *Estes v. City of Gadsden*, 266 Ala. 166, 94 So. 2d 744 (1957), the seminal Alabama case concerning occupational taxes, there are at least three rational bases for legislating an exemption from the occupational tax for the self-employed who pay existing business license taxes, which is the situation pertaining to those exempt persons described in clauses (i) and (ii) of the preceding paragraph. First, the exemption avoids having to disturb business license tax classifications – established antecedent to the levy of the occupational tax – by economically integrating such classifications with the occupational tax; second, it avoids double taxation of the self-employed who already pay a business license tax; and third, it reflects the legislative judgment that a different rate of occupational tax can be justified, if applied to

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[3] Although ordained ministers are not expressly exempted from the occupational tax by Act. No. 67-406 or Ordinance No. 1120, the Alabama Supreme Court interpreted the County's failure to date to enforce the tax against ordained ministers as a recognized exemption. See part IV of the Argument in this brief.

gross compensation as a measure of the tax, because sole proprietors have expenses in the operation of their businesses, while employees are taxed on a salary free of expenses.

Numerous reasons can be adduced as a rational basis for the Alabama Legislature's decision, going back to 1927, to exempt state-licensed professionals from county taxation. By modern standards, the state's regulation of these professions was embryonic when the tax exemption was first instituted. Recognizing that the imposition of license taxes on the learned professions should either be a part of the state regulatory system or should be controlled in a manner so that it did not impede objectives of the regulatory system, the Legislature could have rationally concluded that counties should not be permitted to tax independently the learned professions. By analogy to the right of travel that is an important incident of national citizenship, *Zobel v. Williams, supra,* it is readily conceivable that, as a further rational basis for prohibiting county taxation of professionals, the Legislature believed that the welfare of the people would be served by allowing doctors, lawyers, engineers and architects, etc. to perform their work all over the state without having to worry about local taxes. Even if such taxes are not economically oppressive, they could still be an impediment to the statewide availability of professional services because they require local knowledge, the completion of unfamiliar paperwork, and the risk of prosecution for noncompliance.

Concerning a rational basis for exempting domestic workers in private homes from the occupational tax, no

better statement can be found than that of this Court in *Carmichael v. Southern Coal & Coke Co., supra* at 513:

> Relatively great expense and inconvenience of collection may justify the exemption from taxation of domestic employers, farmers, and family businesses, not likely to maintain adequate employment records, which are an important aid in the collection and verification of the tax.

In its opinion below, the Alabama Supreme Court concluded that:

> . . . the prohibition found in Act 406 against further taxation of persons engaged in professions and occupations subject to the state-licensing requirements furthers several possible legitimate governmental purposes. These governmental purposes may be those of economic development, statewide uniformity, or the protection of a future source of tax revenue. Any one of these purposes, or all of them, could serve as the rational and legitimate basis of the exempt classifications created by Act 406 (and adopted by legislative mandate in Ordinance No. 1120), which prohibits further taxation of persons engaged in the specified professions and occupations. Because we conclude that a fair and rational basis supports the challenged classification, we conclude that the *Richards* class has not met its burden of negating any conceivable set of facts that would support this challenged classification.

Pet. App. 24.

III. The Alabama Supreme Court's decision below is not in conflict with, and does not purport to "overrule", this Court's decision in *Jefferson County v. Acker*, 527 U.S. 423 (1999).

The petitioners' Petition for certiorari erroneously argues (at pp. i, ii, 3, and 14-16) that this Court held in *Jefferson County v. Acker*, 527 U.S. 423 (1999), that Jefferson County's occupational tax "is an income tax and not a business license tax."

Since the Public Salary Tax Act does not use the term "income tax" it was unnecessary for this Court, in its opinion in *Jefferson County v. Acker, supra*, to decide whether the County's occupational tax is an "income tax," and this Court did not do so. Instead, this Court concluded in its opinion in *Acker* that Congress had consented to the County's taxation of "pay or compensation for personal services" rendered within Jefferson County by U.S. District Judges Acker and Clemon. In reaching this conclusion, this Court stated in its *Acker* opinion:

> [T]here is no sound reason to deny Alabama counties the right to tax with an even hand the compensation of federal, state, and local office-holders whose services are rendered within the county.

527 U.S. at 443-44.

This Court did *not* hold in *Acker* that the County's occupational tax imposed by Ordinance No. 1120 violates the Alabama Constitution or violates Alabama law, or is an "income tax" under Alabama law. Instead, this Court upheld the occupational tax on the compensation of federal judges based upon the Court's conclusion that, as a

matter of *federal* law, the United States had *consented* to the imposition (by the state or by a political subdivision thereof or by an agency or instrumentality of one or more of the foregoing) of a nondiscriminatory tax levied for revenue purposes on, measured by, or with respect to gross receipts or compensation.

This Court's opinion in *Acker* discusses, and is consistent with, this Court's earlier decision in *Howard v. Commissioners of Sinking Fund of Louisville*, 344 U.S. 624 (1953), upholding a license fee or privilege tax imposed by state or local governments on the ground that Congress had consented, in 4 U.S.C. § 106(a) (the "Buck Act"), to the imposition of state or local taxes "levied on, with respect to, or measured by, net income, gross income, or gross receipts" (which were defined as an "income tax" as a matter of federal law for purposes of the Buck Act by 4 U.S.C. § 110(c)). The majority's opinion in *Acker* noted that this Court had earlier concluded in *Howard* that Congress had consented to the imposition of a tax measured by income even though the local tax was styled as "a tax upon the privilege of working within [the municipality]" and even though the local tax was not considered an "income tax" under state law. 527 U.S. at 438. In *Acker*, this Court concluded that Jefferson County's occupational tax "serves a revenue-raising, not a regulatory, purpose." 527 U.S. at 440.

In the present case, petitioners (at pp. i, ii, 3, and 14-16) argue that the Alabama Supreme Court's decision below "overrules" or is in conflict with this Court's decision in *Jefferson County v. Acker, supra*, based on petitioners' premise that the County's occupational tax must be regulatory if it is a license tax or, alternatively, an

income tax if it merely raises revenue. Petitioners' premise is incorrect. *See, e.g., Black's Law Dictionary* (6th ed. 1990), which defines "license tax" as follows:

> The term "license tax" includes both a charge imposed under [the] police power for the privilege of obtaining licenses to conduct particular businesses, and taxes imposed upon businesses for [the] sole purpose of raising revenue.

As the Alabama Supreme Court noted in its November 17, 2000 opinion in *Parker v. Jefferson County* [Resp. App. 1-6.], the County's occupational tax imposes "a tax upon the privilege of working"; is not an "income tax" as defined under state law; and deviates from "textbook income tax characteristics" in that the occupational tax is measured by one-half of one per centum of "earned compensation," rather than being measured by "income" from all sources, including dividends, interest, rental income, and capital gains. The Alabama Supreme Court's November 17, 2000 opinion in the *Parker* case was entirely consistent with prior decisions of the Alabama Supreme Court which have held that an occupational tax is not, as a matter of Alabama law, an "income tax." *See, e.g., Estes v. City of Gadsden, supra; McPheeter v. City of Auburn*, 288 Ala. 286, 259 So. 2d 833 (1972); and *Bedingfield v. Jefferson County*, 527 So. 2d 1270 (Ala. 1988). Moreover, the Alabama Supreme Court's November 17, 2000 opinion in *Parker* is consistent with prior decisions of this Court, including *Philadelphia & Southern Mail S.S. Co. v. Commonwealth of Pennsylvania*, 122 U.S. 326, 345 (1887), in which this Court held unconstitutional a tax equal to eight-tenths of one per centum of the gross receipts from the

business of transporting freight or passengers. In its *Philadelphia & Southern Mail S.S. Co.* opinion, this Court held that the Pennsylvania tax:

> . . . is not an income tax in the class to which it refers, but [is] a tax on their receipts for transportation only. Many of the companies included in it may and undoubtedly do have incomes from other sources, such as rents of houses, wharves, stores, and water-power, and interest on moneyed investments. . . . It is unnecessary, therefore, to discuss the question which would arise if the tax were properly a tax on income. It is clearly not such, but a tax on transportation only.

IV. Petitioners are not "Muslim clerics" or "tent evangelists". Accordingly, petitioners do not have legal standing to seek certiorari with respect to whether the County's enforcement and collection efforts deprive "Muslim clerics" and "tent evangelists" of equal protection.

At pp. ii, 6, 8, 13, and 14, the Petition seeks a writ of certiorari based on petitioners' argument that Jefferson County's *enforcement* of its occupational tax violates the Equal Protection Clause, because the County has thus far not brought enforcement actions against ordained ministers who have failed to pay the occupational tax. The Petition argues (at pp. 13-14) that the County's enforcement of its occupational tax denies equal protection of laws to "Muslim clerics", "tent evangelists", and other preachers who don't evade this tax.

During the trial below, Randy Godeke, the County's Director of Revenue, who is responsible for collecting the

occupational tax, and Edwin A. Strickland, the County Attorney, testified that Ordinance No. 1120 and Act No. 67-406 do not exempt preachers or ministers of religion, that some ministers pay the tax, while others do not, and that the County has thus far not brought enforcement or collection proceedings seeking to collect the occupational tax from ministers or from churches which employ ministers, because of legal uncertainties involving the First Amendment. [Resp. App. 74-78.]

A number of reported court decisions involve whether the First Amendment to the United States Constitution prohibits cities and counties from levying a license or privilege tax on ministers. *See, e.g., Follett v. Town of McCormick*, 321 U.S. 573 (1944); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943). *See also Jones v. City of Opelika*, 319 U.S. 105 (1943); *Baylor v. Centre County* (Commonwealth Court of Pennsylvania), 1993 WL 73687 (decided March 18, 1993); *Stajkowski v. Carbon County Board of Assessment*, 541 A.2d 1384 (Pa. 1988); *Jimmy Swaggert Ministries v. Board of Equalization of California*, 493 U.S. 378 (1990); *DHR of Oregon v. Smith*, 494 U.S. 872 (1990); *Douglas v. City of Jeannette*, 319 U.S. 157 (1943). In light of these court decisions, and the potential legal costs, time commitments, and risks which are inherent in any litigation, it is entirely understandable, and well within the discretion of the County's law enforcement authorities, that the County has thus far not filed litigation seeking to collect the occupational tax from ministers (or from the churches which employ them).

The trial judge below, Circuit Judge John E. Rochester, did not in his November 12, 1998 Judgment or in his June 17, 1999 Order below mention, discuss or decide

whether ministers should or should not be required to pay the occupational tax or should or should not be exempted therefrom. The County took an appeal from Judge Rochester's June 17, 1999 Order (and his November 12, 1998 Judgment) to the Alabama Supreme Court (No. 1981680) below, arguing that the trial court below erred in enjoining the County from continuing to collect the occupational tax unless the County began collecting that tax from persons exempted by Section 4 of Act No. 67-406 and Section 1(B) of Ordinance No. 1120 and, further, erred in holding that Section 4 and Section 1(B) violated the Equal Protection Clause. Section 4 of Act No. 67-406 and Section 1(B) of Ordinance No. 1120 do not exempt preachers. The County's failure to collect, or to bring enforcement proceedings seeking to collect, the occupational tax from ministers is irrelevant and immaterial to the petitioners' Petition for certiorari to this Court.

The Petition argues (at p. 6 and at p. 13) that "no preachers have any rational basis for evading taxation, whether ordained or not, but some do. Preachers who don't evade this tax are discriminated against on an 'ordination' basis which Jefferson County has established on a completely arbitrary and irrational basis."

At p. 4, the Petition asserts that the plaintiff Richards is a law firm courier, and the original complaint [Pet. App. 43.] asserts that the plaintiff Fannie Hill is a domestic servant. Nowhere does the Petition contend that any petitioner is a "Muslim cleric" or a "tent evangelist" or a "minister", whether ordained or not.

Accordingly, petitioners lack legal standing to seek certiorari from this Court with respect to whether Jefferson County's enforcement of its occupational tax deprives "Muslim clerics" or "tent evangelists" or "ministers" of equal protection. *See, e.g., Hendrick v. Maryland*, 235 U.S. 610, 621 (1915):

> If the statute is otherwise valid, the alleged discrimination against residents of the District of Columbia is not adequate ground for us now to declare it altogether bad. At most they are entitled to equality of treatment, and in the absence of some definite and authoritative ruling by the courts of the state we will not assume that, upon a proper showing, this will be denied. . . . Only those whose rights are directly affected can properly question the constitutionality of a state statute, and invoke our jurisdiction in respect thereto.

Accord, Oliver Iron Mining Co. v. Lord, 262 U.S. 172, 181 (1923):

> It cannot be merely assumed that mining has been resumed at those mines, nor that any tax in respect of them for later years is now threatened. *The situation in these cases is therefore such that none of the plaintiffs is entitled to invoke a decision of the question.* We accordingly leave it entirely open. [Emphasis added.]

V. The exemptions mandated by Section 4 of Act No. 67-406, the exemptions allowed by Ordinance No. 1120, and the County's enforcement and collection efforts to date with respect to the County's occupational tax do not deprive petitioners of equal protection and do not raise novel and unsettled questions which warrant, require or justify issuance of the writ of certiorari requested by petitioners (plaintiffs below).

The Petition argues (at p. 14) that even if Jefferson County could do the impossible, and could articulate a rational basis for the exemptions from the occupational tax, the County's enforcement of the tax would nevertheless violate the Equal Protection Clause. As noted above, this argument ignores the fact that the Alabama Legislature (rather than the County) exempted from further taxation by the County those persons already being taxed pursuant to the State License Code, including attorneys, doctors and certain other state-licensed professionals.

Petitioners engage in hyperbole when petitioners suggest (at p. 14) that this Court has recently addressed, in its *per curiam* opinion in *Village of Willowbrook v. Olech, supra,* the "gravity" of the petitioners' argument that Jefferson County's *enforcement* of its occupational tax violates the Equal Protection Clause and raises questions which are so serious and so important as to merit this Court's issuance of a writ of certiorari for review of this case.

As noted in part IV of the Argument, the trial judge below did not address the County's enforcement and collection efforts and did not make any rulings or make any findings of fact or rulings of law with respect to such

efforts. Instead, the trial judge held that the exemptions *expressly* mandated by Section 4 of Act No. 67-406 and the exemptions *expressly* allowed by Section 1(b) of Ordinance No. 1120 violated the Equal Protection Clause. The appeal by Jefferson County to the Alabama Supreme Court and the opinion below of the Alabama Supreme Court did not address the County's enforcement and collection efforts.

The petitioners (plaintiffs below) are not federal judges, corporate house counsel, nurses, geologists, investment brokers, administrative officers, teachers, police officers, or real estate appraisers. Accordingly, petitioners lack standing to invoke the jurisdiction of this Court to decide whether the County's enforcement efforts unlawfully discriminate against federal judges, nurses, geologists, etc. *See Hendrick v. Maryland, supra;* and *Oliver Iron Mining Co. v. Lord, supra.*

In fact, this Court has already decided, in *Jefferson County v. Acker, supra,* in which two federal judges were before this Court, that Jefferson County may properly collect and enforce its occupational tax against federal judges. There is no need for this Court to revisit that issue.

CONCLUSION

Petitioners have failed to raise any novel or "unsettled" question which has not been, but should be, settled by this Court.

Moreover, petitioners have failed to show that the Alabama Supreme Court decided the issues presented below in a way which conflicts with any relevant decision of this Court. Accordingly, Jefferson County respectfully submits that this Court should deny both the instant Petition for a Writ of Certiorari and the petitioners' alternative request that this Court reinstate the writ of certiorari previously granted with respect to the equal protection question in 1995 and subsequently dismissed as improvidently granted in its order in *Richards v. Jefferson County, Alabama*, 516 U.S. 1167 (1996).

Respectfully submitted,

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